Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

RAMON LOPEZ,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
The The United States Court Of Appeals,
Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a federal criminal defendant entitled to a new sentencing hearing, when the probation officer serves a lengthy presentence investigation report on defense counsel less than two days before the scheduled sentencing hearing; when, over the objection of defense counsel, the trial judge forces the defendant to be sentenced on the scheduled date after giving the defendant only five hours to review that report with his defense counsel; and where such conduct violated the ten-day rule contained in both 18 United States Code Section 3552(d) and Federal Rule of Criminal Procedure 32(c)(3)(A)?

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Ramon Lopez, petitions this court to review the judgment and opinion of the United States Court Of Appeals, Eleventh Circuit in this case.

OPINION BELOW

The full opinion of the court of appeals is unpublished. That opinion is reproduced in its entirety in the appendix to this petition. The decision of the court of appeals, itself, is published in a table contained at 52 F.3d 1071.

BASIS FOR JURISDICTION

The opinion of the lower appellate court was filed on April 5, 1995.

This Court has jurisdiction to review a decision of a United States Court of Appeals pursuant to 28 United States Code Section 1254.

STATUTORY AND RULE PROVISIONS INVOLVED

18 United States Code Section 3552(d) provides:

> Disclosure of presentence reports. – The court shall assure that a report filed pursuant to this section is disclosed to the defendant, the counsel for the defendant, and the attorney for the Government at least ten days prior to the date set for sentencing, unless this minimum period is waived by the defendant. * * *

Federal Rule Of Criminal Procedure 32(c)(3)(A) provides:

> (3) Disclosure.
>
> (A) At least 10 days before imposing sentence, unless this minimum period is waived by the defendant, the court shall provide the defendant and the defendant's counsel with a copy of the report of the presentence investigation,. . . . * * *

STATEMENT OF THE CASE

Petitioner, Ramon Lopez, was charged with one count of attempted escape, in violation of Title 18 United

States Code Section 751. After a jury trial, Petitioner Lopez was convicted of that single count.[1]

1. The Facts Supporting Conviction.

Based on information that Petitioner Lopez desired to escape, the United States Marshals Service set up a sting operation. An undercover law enforcement officer posed as a private investigator, who conversed with both Petitioner Lopez and his common-law wife over a period of several months.

Petitioner Lopez was a federal prisoner, who was awaiting a trial to be held in Miami, Florida. As a consequence of Hurricane Andrew, the federal government incarcerated Petitioner Lopez at various facilities in Florida, including local jails in the general vicinity of Miami, Florida. The undercover officer presented a plan in which he claimed that he could obtain Petitioner Lopez' release by altering Petitioner Lopez' jail record, when Mr. Lopez was being housed in a Florida jail. The altered record was to show that Mr. Lopez was only in jail on a bondable offense, specifically driving under the influence of alcohol. After the records were changed, Lopez would be bonded out of the state facility.

The undercover officer demanded a payment of $ 50,000.00. Although he initially did not want his wife

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[1] Petitioner's wife was charged in a separate count of the same indictment with commission of the crime of aiding and assisting in the attempted escape in violation of Title 18 United States Code Section 752. That woman was tried and convicted at a separate trial.

involved, a change in circumstances cause Petitioner Lopez to involve his wife. Ultimately, Petitioner Lopez had to ask his wife to deliver an initial payment of $ 10,000.00. Two weeks later, a final payment of $ 40,000.00 was made in Stuart, Florida near the Martin County Jail, where Defendant Lopez was then housed. After seeing that money, the undercover officer went to the jail to meet Petitioner Lopez and confirm that Lopez desired to go through with the escape plan.

The undercover federal agent went to the Martin County Jail and talked with Petitioner Lopez. The undercover officer told Mr. Lopez that he intended to bail Lopez out of jail that day and was bringing some clothes for Lopez to change into. Petitioner Lopez confirmed that he, Lopez, wanted the escape plan to be carried out. Petitioner Lopez stated that he intended to go to Texas to be near the Mexican border and that he intended to have plastic surgery. Petitioner Lopez was arrested at this time.

The Marshals Service never prepared altered records and never placed those records at a local jail. The officers never let Lopez even start to exit the jail under the belief that he was being bonded out. Admittedly, the Marshals Service never intended to let Petitioner Lopez actually escape.

2. Petitioner Lopez' Sentencing.

The jury convicted Petitioner Lopez on September 30, 1993. A single-spaced, typewritten, twenty-four-page presentence investigation report was prepared by a United States Probation Officer. On its face, that report showed

that it was prepared on November 15, 1993.[2] Sentencing was expressly noted on that report as being scheduled for 9:00 a.m. on November 18, 1993. The cover sheet to that report shows that this report was not made available for disclosure until November 16, 1993. One line on that page reads: "Objections Due By: ASAP."[3]

Mr. Lopez' sentencing hearing began at 10:45 a.m. on November 18, 1993, as scheduled. The trial judge began this proceeding by announcing that he had read the report and had noted a Double Jeopardy Clause issue that the probation officer raised as a basis for a downward departure from the recommended sentence.[4] The trial judge asked the prosecutor to state the Government's position. That Assistant United States Attorney took the position that there was no constitutional violation, stating: "I received the PSI[5], I believe it was the day before yesterday, Judge, so I don't have all the cases in hand, and I am trying to remember the names of the cases."

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[2] The record does not reveal the reason for the lateness in preparation of this report. It should be assumed that the probation officer had a valid reason for his delay in drafting this document.

[3] The cover sheet and an excerpt of the first two pages of the presentence investigation report are reproduced in the appendix to this petition.

[4] That recommendation from the probation officer was prescient. This Court just made the same suggestion as a viable response to a situation similar to that presented in Mr. Lopez' case. *Witte v. United States*, ___ U.S. ___ (opinion filed June 14, 1995).

[5] The letters "PSI" refer to the presentence investigation report.

Following the prosecutor's argument, the trial judge asked defense counsel if the defense had any objections to the presentence investigation report. Defense counsel immediately replied: "Well, Your Honor, I, like the prosecutor, received this the day before yesterday.[6] Yesterday I was in deposition on an out of town expert from 8:30 to 5:30 or 6:30 in the evening. I have not had an opportunity to review this with Mr. Lopez." This attorney for Petitioner Lopez stated that he, himself, had not obtained this document until the afternoon of November 16th and had read that twenty-four-page report "very briefly in the time that I had." The trial judge chastised defense counsel for deciding to take a deposition, rather than read the report. Defense counsel responded that he had no choice, because the deposition was of an expert witness, who came from Mississippi, and because defense counsel did not possess the report until two days before.

The trial judge asked defense counsel what the defense wanted to do. Mr. Lopez' attorney stated unambiguously, "I am not ready to proceed on this PSI report." This federal district court judge stated: "We will see you at 2:00 this afternoon. Cancel whatever you have got and concentrate, certainly three hours will be sufficient to read a twenty-four page presentence investigation report,. . . . " The judge reasoned that there should be no distinction between the report in this case and a report prepared for Mr. Lopez' sentencing in a prior case. To that comment, this defense attorney stated that he was not the

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[6] Neither Petitioner Lopez nor the Government filed written objections to the presentence investigation report.

attorney who represented Petitioner Lopez at that other sentencing proceeding.

Defense counsel also stated that he did not believe that the court had given him enough time to file written objections. The trial judge solved this complaint with this pronouncement: "You don't have to file written objections. I will waive the rule requiring written objections. Oral objections will be allowed. There is no problem with that, so your client's rights will be preserved." This judge then reset this sentencing for 4:00 p.m. on the very same day.

Defense counsel professionally accepted his dilemma with the comment that "I will attempt to comply and do an effective job at sentencing." That attorney stated that he would be unable to research the double jeopardy issue in response to the prosecution's prior argument. The trial judge responded that this research was unnecessary, because the judge was inclined to impose a concurrent sentence. Additionally, this judge stated: "[Mr. Lopez] has a horrible record. He has a life sentence. We could spend hours discussing the law and it is very interesting, but it is not very practical when I have people waiting. But if you want time to read it, I will give you time." "I want you to read carefully the presentence investigation report. I don't want to have a 2255 and you don't want to have a 2255."[7]

The sentencing hearing resumed that afternoon. The judge observed that it was 4:20 p.m. The trial judge

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[7] The trial judge was referring to a motion to vacate the judgment pursuant to Title 28 United States Code Section 2255.

stated: "Anything that anybody wants to bring up dealing with the presentence report? Of course, I will accept any oral objections or anything that anyone wants to present."

In the written report, the probation officer did not enhance the offense level for obstruction of justice. The prosecutor orally argued that the trial judge should adjust the offense level by increasing it two levels for obstruction of justice.

Defense counsel argued against the prosecutor's request for an enhancement based on obstruction of justice.[8] Next, defense counsel drew the court's attention to the probation officer's written statement regarding an adjustment for acceptance of responsibility, which read: "Mr. Lopez has made no statement for inclusion in the presentence investigation." This defense attorney requested that the trial court award such an adjustment to Mr. Lopez. Defense counsel explained that Mr. Lopez made no statement, because there was obviously no time for him to make a statement and because no probation officer interviewed this defendant prior to the writing of this report. The trial judge countered that argument by offering Mr. Lopez the opportunity to make a statement in court. The trial judge stated that he certainly would not penalize Mr. Lopez for not being given a prior opportunity to make a statement. Finally, Lopez' attorney raised an argument that double counting occurred in the calculations.

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[8] In the morning and after an initial brief discussion with Petitioner Lopez' defense counsel complained about the severity of the criminal history category determined for Mr. Lopez.

At this point, the trial judge stated: "Is that it? I am not necessarily inviting more objections. I am merely allowing them. I have a tendency to be brisk." After the defense argued for a downward departure, the prosecution responded.

The trial judge rejected a decrease for acceptance of responsibility and granted the Government's request that Petitioner Lopez' offense level be increased for obstruction of justice. The court also rejected a challenge to the criminal history category. "There being no other . . . objections to the presentence report," the trial judge adopted the findings of fact and conclusions of law contained in the presentence report to the extent that they were not inconsistent with that court's oral rulings. The trial judge was informed that the newly-adjusted sentencing range was forty-one to fifty-one months and sentenced Mr. Lopez to "the highest range possible, fifty-one months." That judge ordered this sentence to be served concurrently with prior federal sentences in order to avoid any double jeopardy issue. This hearing ended at 4:45 p.m.

On his direct appeal, Petitioner Lopez argued that he was entitled to a new sentencing hearing, because of the lateness in the service of the presentence investigation report.[9] In its brief, the Government argued that Mr. Lopez did not request a continuance and did not object to

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[9] Petitioner Lopez and his co-defendant wife filed a joint brief. Both appellants challenged the sufficiency of the evidence. The co-defendant raised an issue regarding the striking of a black juror at the co-defendant's separate trial. Neither of those issues is being pursued in this Court.

the sentencing after the recess. The Government also took the position that Mr. Lopez never established how he had been prejudiced by the late receipt of this document. The lower appellate court ruled against Mr. Lopez without explaining its reasoning.

REASONS FOR GRANTING THE PETITION

The issue presented by this petition applies to every federal criminal case that results in a conviction.

Sentencing under the present Federal Sentencing Guidelines is complex and a more-formalized process than had existed before. That system has generated much litigation at all levels of the federal court system. Differences in interpretation of sentencing law that emanate from the various lower appellate courts have led to numerous amendments in the wording of the guidelines and alterations in policy statements for those guidelines. In addition to the legal issues that face a convicted federal criminal defendant, a sentencing proceeding generates potential factual disputes of significant consequence.

Given the complexity and harshness of the present federal sentencing guideline system, Congress sought to provide a criminal defendant with at least a modicum of protection. One of those shields is the requirement that a defendant not be sentenced until both that defendant and his attorney receive a copy of the presentence report at least ten days before the imposition of a sentence upon

that defendant.[10] This protection is doubly stated in forceful terms. Title 18 United States Code Section 3552(d) provides that a trial judge "shall assure that a report . . . is disclosed . . . at least ten days prior to the date set for sentencing unless this minimum period is waived by the defendant." Federal Rule of Criminal Procedure 32(c)(3)(A) provides that the court shall provide a copy of the presentence investigation report to both the defendant and his attorney "[a]t least 10 days[11] before imposing sentence, unless this minimum period is waived by the defendant."

The present version of Federal Rule of Criminal Procedure 32(c)(3)(A) was promulgated in the year 1983. The committee notes for this provision state, in summary, that untimely disclosure eliminates any assurance of factual accuracy, precludes submission of additional facts by the defense, and hinders informed comment.

A violation of the ten-day rule does more than generate a potential for factual error. Such a violation disarms every presumption supporting the policy of finality in the sentence, which policy this Court has strictly enforced in its decisions.

The sentencing hearing is intended to be a one-time-only event. Seven days after sentencing, the trial court loses jurisdiction to correct a sentence, absent a determination by an appellate court that the imposed sentence

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[10] Even the Government is protected by the assurance that it also will have at least ten days to review this report.

[11] This period of ten days does not include Saturday, Sunday and holidays. Fed. R. Crim. P. 45(a).

was illegal. Fed. R. Crim. P. 35(a) and (c). This Court has highlighted the long-standing rule that the failure to articulate a sufficient objection in the trial court works a forfeiture of any possible claim at the appellate court level. A defendant still has a theoretical right to relief on direct appeal under the doctrine of plain error. However, not only are the requirements of that doctrine very difficult for a criminal defendant to meet, but even if met, relief is still dependent on the discretion of the appellate court. *United States v. Olano*, ___ U.S. ___, 113 S.Ct. 1770 (1993).

Once the direct appellate process is over, the likelihood of relief on any sentencing claim – no matter how concededly valid that claim might be – becomes even less possible. This Court has held that the postconviction remedy provided by Title 28 United States Code Section 2255 does not encompass all errors in federal sentencing. That remedy was not intended to modify the basic distinction between direct review and collateral review either regarding errors of law or errors of fact. *United States v. Addonizio*, 442 U.S. 178, 184-186 (1979). Even when a sentencing claim is raiseable for the first time on collateral attack, the standard for review during a collateral attack is even more stringent than that provided for under the plain error doctrine that applies to direct appeals. This latter principle is based on the presumption that the defendant "already has had a fair opportunity to present his federal claims in a federal forum." *United States v. Frady*, 456 U.S. 152 at 164-168 (1982).

Under the above law, the value of asserting every legal and factual error in the sentencing process at the time of the sentencing hearing, itself, becomes priceless. Given the complexity of present sentencing law,

the need for assistance of counsel becomes even more crucial than at any time in the past. *See Gardner v. Florida*, 430 U.S. 349, 358 (1977); *Mempa v. Rhay*, 389 U.S. 128, 133-135 (1967). For this reason, the concept of finality depends in part on the assumption that a criminal defendant had effective assistance of counsel in ferreting out legal claims and factual errors of significance to both the sentencing process and conditions of subsequent incarceration. When counsel has been denied an adequate time to prepare, his mere presence at a defendant's side does not constitute the assistance of counsel envisioned by the Sixth Amendment. *United States v. Cronic*, 466 U.S. 648 (1984).

A violation of the ten-day rule is the type of flaw that should not be subject to a harmless error analysis of the record on appeal. How can an appellate court determine from the appellate record that no harm can exist, when the defendant and his counsel lacked time to discover and place in that record all facts and legal issues that might bear on that ultimate determination? *See Sullivan v. Louisiana*, ___ U.S. ___, 113 S.Ct. 2078 (1993); *Gardner v. Florida*, 430 U.S. 349, 362 (1977).

The presumptions regarding factual accuracy, correctness of sentencing guideline applications, and forfeiture of issues on appeal all depend on the assumption that the defendant and his attorney have had an adequate time to review the report individually and together. For that reason, this Court should compel strict compliance with the ten-day rule.

The ruling by the lower appellate court in this case conflicts with the decision in *United States v. Edwards*, 945 F.2d 1387, 1404 (7th Cir. 1991). It is respectfully suggested that the issue in this case is even more significant than the sentencing issue of timely notice

which this Court deemed worthy of review in *Burns v. United States*, 501 U.S. 129 (1991).

CONCLUSION

For the above-stated reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Counsel For Petitioner

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APPENDIX

Page

Opinion Of The Lower Appellate Court.....App. 1

Excerpt From Presentence Investigation Report.....App. 3

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-5354
Non-Argument Calendar

D.C. Docket No. 92-708-CR

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAMON LOPEZ,
ALIX COBA,

Defendants-Appellants.

Appeals form the United States District Court
for the Southern District of Florida

(April 5, 1995)

Before ANDERSON and CARNES, Circuit Judges, and JOHNSON, Senior Circuit Judge.

PER CURIAM:

In November 1992, Ramon Lopez was indicted with one count of attempted escape, in violation of 18 U.S.C.A. § 751 (West 1976 & Supp. 1994), and Alix Coba was indicted with one count of aiding and assisting in Lopez' attempted escape, in violation of 18 U.S.C.A. § 752 (West 1976 & Supp. 1994). In separate trials, Lopez and Coba

were each convicted on the count charged against them in the indictment. Lopez was sentenced to fifty-one months' imprisonment and three years' supervised release. Coba was sentenced to eighteen months' imprisonment and two years' supervised release. On appeal, Coba contends that the district court erred in refusing to recognize her objection to one of the prosecution's peremptory challenges to a prospective juror. Lopez contends that he did not receive adequate notice of his presentence report. Finally, Coba and Lopez jointly contend that the evidence was insufficient to support the verdicts. After review of the record, we conclude that Lopez' and Coba's contentions are without merit.

AFFIRMED.

POSITION OF PARTIES WITH
RESPECT TO SENTENCING FACTORS

RE: RAMON LOPEZ

DOCKET NO: 92-708-CR-MORENO

OBJECTIONS DUE BY: ASAP

DATE AVAILABLE
FOR DISCLOSURE: November 16, 1993

==========

I have read the presentence investigation completed by the United States Probation Office.

____ There are no disputed facts.

____ There are unresolved factual disputes which are attached.

(Defendant)	(Date)	
(Attorney) Robert Rosenblatt	(Date)	Miami (Location)
(Assistant U.S. Attorney) Karen Rochlin	(Date)	Miami (Location)

Return To: Kenneth J. Gonzalez
U. S. Probation Officer
300 NE 1st Avenue
Room 315
Miama, Florida 33132-2126

Non-Guideline ___

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA vs. RAMON LOPEZ	PRESENTENCE INVESTIGATION REPORT Docket No. 92-708-CR-MORENO Defendant No. 01 Guideline Manual: 1993

Prepared for: The Honorable Federico A. Moreno
U. S. District Judge

Prepared by: Kenneth J. Gonzalez/lah
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Sentence Date: November 18, 1993 @ 9:00 a.m.
Offense: Count One: Knowingly and Willfully Attempt to Escape from the Custody of the Attorney General of the United States in violation of 18 U.S.C. § 751(a), a Class D felony.

Penalty: Zero to five years in the custody of the Bureau of Prisons and/or a $250,000 fine.

* * *

Date Report Prepared: 11/15/93 **Date Report Revised:**

* * *